DAVID CAPJOHN
OSCAR CHRISTIANSEN

IBLA 74-18, 65 Decided February 4, 1974

Appeals from rejections of Alaska native allotment applications AA-7218, 7505.

Affirmed.

Alaska: Native Allotments

> Withdrawn lands and lands closed to non-mineral entry are not open to appropriation under the Alaska Native Allotment Act. No rights may be initiated under the Alaska Native Allotment Act by occupation and use of lands not open to appropriation.

APPEARANCES: James Grandjean, Esq., of the Alaska Legal Services Corporation for appellants; Loretta C. Douglas, Esq., Office of the Solicitor, Department of the Interior.

OPINION BY MR. HENRIQUES

David Capjohn and Oscar Christiansen appealed from separate decisions of the Alaska State Office, Bureau of Land Management, rejecting their applications for Alaska native allotments. 43 U.S.C. § 270-1 (1970) [Repealed December 18, 1971), Pub. L. 92-203, 43 U.S.C. § 1617 (Supp. II. 1972)]. Each appellant has asserted occupancy and use of the land since 1957 or 1958. Each application was rejected because the lands were withdrawn by Executive Order 8344 of February 10, 1940, and have been closed to appropriation at all times since. The decisions recited that the lands remained closed to entry even though Executive Order 8344 was revoked in 1961 because they were at that time embraced in a 20-year grazing lease, Anchorage 050255, issued in 1960; and the lands are further segregated from entry by an application from the State of Alaska for selection thereof pursuant to section 6 of the Statehood Act of July 7, 1958, 72 Stat. 339, and the regulations issued thereunder, 43 CFR Subpart 2627.

Appellants concede that the use and occupancy of the separate tracts commenced at a time when the land was withdrawn by Executive Order 8344. They argue, even though their occupation was not authorized because of Executive Order 8344, that their occupation and use precluded the 1960 grazing lease from issuing. They assert that the grazing lease is subject to their pre-existing rights. They cite myriad authorities to emphasize that Indians and Natives may not be disturbed in their use and occupancy.

Lands open to settlement and occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others. 43 CFR 2091.6-3. The filing of an acceptable application for allotment will segregate the land to the extent that conflicting applications will be rejected, 43 CFR 2091.9-5. The filing of a state selection application also segregates the land from all other appropriations, 43 CFR 2091.6-4. Lands leased under the Alaska Grazing Act of March 4, 1927, 48 U.S.C. §§ 471, 471a, 471o (1958), are not subject to settlement, location and acquisition. 43 CFR 4131.3-1. Although the existence of a grazing lease, issued under the Act of March 4, 1927, supra, is effective to bar settlement of the land covered thereby, it does not preclude the filing of a State selection application for the land, which, when filed, segregates the land from all appropriations based upon application or settlement or location. Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971). "Lands," as used in the cited regulations, means land which is otherwise open and unappropriated; withdrawn or reserved lands are excepted and closed to subsequent appropriations. United States v. Minnesota, 270 U.S. 181 (1926). Any attempted settlement, use, or occupation of reserved lands is a trespass which will sustain an action in ejectment. Jones v. United States, 13 Alaska 629, 195 F.2d. 707, (9th Cir. 1952).

Correlative to the foregoing we remark that a person who has initiated rights under the public land laws but has not fully complied with the law, is subject to having his claim defeated where the land is withdrawn under statutory authority. See United States v. Norton, 19 F.2d 836, (5th Cir. 1927). But a grazing lease or state selection, both of which close public lands to further appropriation because of regulatory requirements, will not serve to defeat previously initiated valid rights--such rights attach to the land and may be perfected. If appellants had any prior valid rights, such rights could not be defeated by issuance of the grazing lease or by the State selection application.

Examination of the record does not lend support to the cause of these appellants.

In the instant cases appellants first occupied or used the land at times after they had been withdrawn by E.O. 8344; this withdrawal remained in effect until revoked in 1961. In the meantime a grazing lease, authorized to embrace withdrawn lands in accordance with the Alaska Grazing Act, 43 U.S.C. § 316(b) (1970), 43 CFR 4131.0-3, was issued effective in 1960 for a 20-year period. As this Board held in Harold J. Naughton, supra, no rights are acquired under the Alaska Native Allotment Act, 48 U.S.C. §§ 357, 357a, 357b (1958) by a native who purportedly commenced his occupation of the land at a time when the land was withdrawn from all forms of appropriation. So the lands embraced in the grazing lease would not be open to appropriation upon the revocation of the withdrawal in 1961 "unless and until the authorized officer of the Bureau of Land Management determines that the grazing lease should be cancelled or reduced in order to permit * * * development and utilization of the lands * * * and that the lands are suitable for and otherwise subject to the intended settlement, location, entry or acquisition." 43 CFR 4131.3-1. Since such determination has never been made, the lands are not now open to appropriation. From 1949 to 1961 they were withdrawn under E.O. 8344; since 1961 they were not open because of the prior issued grazing lease. It follows that appellants' occupancy, allegedly initiated in 1957 and 1958, of lands which have not been open thereto since 1940, gained them no rights. Harold J. Naughton, supra.

Even were we now to cancel the grazing lease, appellants could not establish rights which would antedate the repeal of the Alaska Native Allotment Act by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. II, 1972).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions below are affirmed.

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Douglas E. Henriques, Member

We concur:

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Anne Poindexter Lewis, Member

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Joan B. Thompson, Member